ECJ rules on screen-scraping of Ryanair's database

The European Court of Justice's ('ECJ') decision on 15 January in case C-30/14, adds another tile to the mosaic of case law concerning disputes between Ryanair and online travel agencies ('OTAs') and price comparison websites. Ryanair claims that its website is the only marketplace authorised to sell its tickets and that mediation activity in the sale of such tickets performed by any third party is illegitimate. Marco Consonni and Ludovico Anselmi of Orsingher Ortu - Avvocati Associati, analyse the background to the case, previous decisions of the EU courts and why the ECJ's ruling that EU Directive 96/9 does not prevent Ryanair from restricting screen-scraping of its flight data via contractual arrangements does not necessarily mean that Ryanair will be entitled to enforce such contractual obligations on third party OTAs in different EU jurisdictions.

The ECJ's latest decision stems from litigation between Ryanair and a Dutch price comparison site, PR Aviation BV. PR Aviation operates www.wegolo.com, on which users can get information about low cost flights, compare relevant routes and prices and make bookings. For those purposes the website obtains the necessary information by automated means, including extraction of data from Ryanair's website. Relying on the European Directive 96/9/EC (on the legal protection of databases) as well as on the Dutch laws implementing the latter, Ryanair sued PR Aviation, claiming that the latter was liable for infringing its rights relating to its data set and, on top of that, for breaching the terms and conditions governing the use of Ryanair's website. Such terms and conditions ('GCUs') prohibited, among others, extraction and use of relevant data for commercial purposes (unless a prior licence agreement had been entered into). Visitors of the airline website were required to accept them (by ticking a box) before making use of the site.

At the end of the first degree judgment, in July 2010, Ryanair's claims were dismissed as regards the infringement of Directive 96/9/EC, but sustained in the parts regarding the alleged breach by PR Aviation of Ryanair's right under the Dutch national laws, pursuant to a specific provision of the latter that protects non-original writings.

The defendant appealed the first degree ruling and Ryanair brought a cross-appeal against the part of the decision pursuant to which its database was not eligible for protection under Directive 96/9. In March 2012 the Court of Appeal overruled the first degree judgment and dismissed Ryanair's cross-appeal, stating that even assuming that Ryanair's database was protected under copyright laws applicable to databases, PR Aviation had not infringed Ryanair's rights. This was because the use of Ryanair's data by PR Aviation was deemed normal and legitimate pursuant to applicable Dutch copyright laws.

Ryanair then challenged the second degree decision before the Supreme Court of the Netherlands, claiming that the Court of Appeal was wrong in deeming that: (i) Ryanair's database could not benefit from protection granted by copyright laws; and (ii) that PR Aviation was not culpable of infringement of the GCUs governing Ryanair's data.

The Netherlands Supreme Court decided to stay the proceedings and refer the following question to the ECJ for a preliminary ruling: 'Does the operation of [Directive 96/9] also extend to online databases which are not protected by copyright on the basis of Chapter II of [that Directive], and also not by a *sui generis* right on the basis of Chapter III, in the sense that the freedom to use such databases through the (whether or not analogous) application of Article[s] 6(1) and 8 in conjunction with Article 15 [of Directive 96/9], may not be limited contractually?'

In answering the questions the ECJ followed simple reasoning:

(a) Directive 96/9/EC provides for two kinds of database protection: (i) the first one, set forth in Articles 3 to 6 of the Directive, applies to databases which 'by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation'; (ii) the second form of protection, provided by Articles 7 to 11 of the Directive, 'consists in protection on the basis of a *sui generis* right and is applicable, according to Article 7(1), to databases in respect of which there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents';

(b) The above notwithstanding, lawful users of protected databases (pursuant to Articles 6 (1) and 8 of the Directive) have the right to make certain use of the databases even without the authorisation of the relevant copyright or *sui generis* right's owner. Authorised uses include temporary or permanent reproductions, translation, adaptation, arrangement and any other alteration, distribution and communications to the public. Furthermore, the Directive provides (Article 15) that any contractual provision contrary to

Articles 6 (1) and 8 shall be null and void;

(c) Contrary to what had been maintained by PR Aviation in the course of proceedings, the limitations to the exclusive rights of the database owners (as resulting from Articles 6(1), 8 and 15 of the Directive) do not apply to any databases but only to those meeting the basic requirements or the copyright or the *sui generis* protection; and

(d) Databases not eligible for the above protection can be safeguarded via contractual arrangements. Such a conclusion, according to the Court, is coherent with the balance of interests underlying Directive 96/9/EC. Indeed, the latter is aimed at ensuring that the rights' owners, whilst granted, in reward of the intellectual work and/or financial investment devoted to the creation of the database, with broad exclusive rights, cannot prevent the databases' lawful users from performing certain activities that are in the general public interest. On the other hand, the developers of databases not protected under the Directive do not benefit from such a wide and automatic protection. It is in the light of this that they are entitled to protect their databases via contractual arrangements, provided applicable national laws allow such an option.

The ECJ's decision has caught the attention of e-commerce operators and their legal advisors, since it deals with a topic that has been much debated between Ryanair and the OTAs before many EU courts. Typically, among the claims raised by Ryanair in the course of such proceedings, there is the allegation that the travel agencies, for the purposes of providing their clients with information about Ryanair flights, screen-scrape such data from Ryanair's website. Such activity, according to the Irish airline, entails a breach of both: (a) the copyrights and/or *sui generis* rights claimed by the airline in respect of the data set formed by its own flights' information, and (b) the GCUs governing the use of the Ryanair website and providing, *inter alia*, that such website is the only authorised channel for marketing and purchasing Ryanair tickets and that extraction and commercial reuse of data is prohibited. In many instances, the above claims have been turned down by the courts, which have ruled in favour of the OTAs.

By way of example, the Court of Milan recently decided two litigations between Ryanair and two leading Italian OTAs (decision no. 7808/2013, *Lastiminute.com v. Ryanair*; decision no. 7825/2013, *Viaggiare v. Ryanair*) by rejecting all Ryanair's claims and ordering Ryanair to pay damages to the OTAs for unfair competition and abuse of dominant position. Among others, the Milan court ruled that: (a) the data sets consisting of Ryanair flight information cannot benefit from either the copyright nor the *sui generis* right protection, and consequently the relevant OTAs were not culpable for making such data available to their customers; and (b) the GCUs of Ryanair's website (in the version of the time) were not binding for a subject that allegedly screen-scrapes Ryanair's data, since, by the very act of violating the restrictions to data extraction, the alleged screen-scraper expresses its will not to accept the terms proposed by Ryanair. Both decisions have been challenged by Ryanair before the Court of Appeal of Milan. The appeal judgments have been concluded and the ruling is expected to be issued shortly. These decisions are in line with others taken by major EU courts that have ruled that OTAs are allowed to intermediate the sale of Ryanair's tickets for several different reasons, including the fact that Ryanair's GCUs are not binding because they are not accepted by the OTAs. In this respect, see *inter alia* the decisions of the: (a) Tribunal of Commerce of Paris, 9 November 2007 (*Ryanair Ltd. v. La Sociètè Vivacances S.A.*); (b) Tribunal of Commerce of Barcelona, 6 October 2008 (*Vacaciones E-dreams S.l.u. v. Ryanair Ltd.*); (c) Tribunal of Commerce of Barcelona, 20 January 2009, and Court of Appeal of Barcelona, 15 December 2009 (*Ryanair Ltd. v. Atrapalo S.L.*); (d) Tribunal of Commerce of Barcelona, 30 July 2010, Court of Appeal of Barcelona, 22 March 2012, and the Spanish Supreme Court, 9 April 2013 (*Ryanair Ltd. v. RUMBO*); (e) Court of Frankfurt, 21 August 2008 and Court of Appeal of Frankfurt, 5 March 2009 (*Cheap Tickets BV v. Ryanair Ltd.*); and (f) Spanish Supreme Court, 9 October 2012 (*Ryanair Ltd. v. Atrapalo S.L.*).

The decision of the ECJ has been welcomed by Ryanair. On 15 January the airline launched a press release stating that 'Ryanair welcomes the EU Court of Justice ruling which confirms that Ryanair can prevent PR Aviation from screenscraping the Ryanair database and using this information for commercial purposes. Ryanair will continue to pursue screenscraper websites such as PR Aviation to prevent Europe's consumers from being misled over price and booking conditions.' Some third party commentators have, although less enthusiastically, also described the decision as substantially favourable to the Irish carrier. But is it really so?

On a closer look, it seems that the decision has been overcharged with significance. The ECJ did not state that Ryanair is entitled to prevent third parties from screen-scraping

its flight data. On the contrary, it just stated that: (a) the special regulation set forth in the European Directive 96/9/EC does not apply to the databases that are not eligible for copyright or *sui generis* right protection, as it is for Ryanair's database, that has been deemed not protectable under the above Directive; and (b) for such databases, the relevant owner is entitled to set up contractual restrictions on third parties' use of the data, but in any event solely within the limits and in compliance with the forms provided by the applicable national laws. Thus, nothing really new, as it is confirmed that Ryanair's database cannot enjoy the regulation of Directive 96/9/EC and that the possibility to enforce Ryanair's GCUs is subject to applicable national laws (which don't allow this possibility in the majority of EU jurisdictions, as pointed out by the decisions referred to above).

Such statements are the logical and coherent conclusion of a reasoning based on the actual contents of the request made by the Netherlands Supreme Court. Indeed, the question submitted by the Dutch judges was the following: if a database is not eligible for protection under the EU Directive on databases, does said Directive nevertheless prevent the owner of such database from contractually limiting third parties' use of the data? The answer of the Court is 'no,' and it is hardly conceivable that a different conclusion could have been reached. Indeed, a database not falling into the scope of protection of Directive 96/9/EC is technically an immaterial asset to which the Directive simply does not apply. Consequently, any provisions of the latter are obviously not binding for any party. The decision (Section 39) is very clear on this:

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'Thus, it is clear from the purpose and structure of Directive 96/9 that Articles 6(1), 8 and 15 thereof, which establish mandatory rights for lawful users of databases, are not applicable to a database which is not protected either by copyright or by the *sui generis* right under that directive.' So, once the Directive 96/9 has been deemed not relevant, is the owner of a database entitled to put limits to the users' rights? The answer of the Court is 'yes,' but with a major caveat: users' rights can be limited on condition and to the extent that applicable national laws allow implementation of such a limitation through a contract. Several judgments have already pointed out that Ryanair cannot create a prohibition to use its database through the online publication of its GCUs, as the latter don't constitute a valid and enforceable contract between Ryanair and the OTAs for the reason that OTAs have never accepted to be bound by the GCUs. Among the latest decisions sharing such a view see the ruling of the German Federal Supreme Court of Justice dated 30 April 2014: in a litigation involving Ryanair and 'Cheaptickets,' the court came to the conclusion that a meta search engine which carries out, via screen-scraping, a booking of Ryanair's flights on behalf of the consumer, or even in its own name, does not, *per se*, breach Ryanair's rights.

From an Italian law standpoint the possibility of imposing contractual limitations on the OTAs' use of flight data, at least in the formula proposed by Ryanair, is strongly questionable. Indeed, there are major issues concerning contract law and e-commerce regulations at stake. In the two aforementioned 2013 decisions, the Court of Milan, *inter alia*, ruled that such GCUs were not binding: (a) for the OTAs that allegedly screen-scraped Ryanair's data, since they never accepted such GCUs; and (b) nor for the consumers on behalf of whom the OTAs mediated the sale of Ryanair's tickets, since many of the contractual clauses proposed were burdensome and therefore deemed 'vexatious.' In this respect it is worth stating that under Italian law vexatious clauses are not valid unless expressly accepted by consumers via a signature of approval on top of that given for the acceptance of the other parts of contracts. Indeed, in Italy the validity of contracts entered into through a mouse click is debated, most of all when it comes to agreements including vexatious clauses and governing B2C relationships. On top of that, it should be taken into account that preventing price comparison activities may most likely turn out as a limitation of consumers' right to information, which is strictly safeguarded, in Italian and the vast majority of other EU jurisdictions.

To summarise, saying that Directive 96/9 does not prevent Ryanair from restricting screen-scraping of its flight data via contract does not necessarily mean that Ryanair will be entitled to enforce the GCUs vis-à-vis OTAs in different EU jurisdictions. The solution implemented by the airline would be of a contractual nature and the current case law does not seem favourable to Ryanair in this respect.

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